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In the Supreme Court of the United States

OCTOBER TERM, 1979

APPALACHIAN POWER COMPANY, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Claims (Pet. App. 1a-16a) is reported at 607 F.2d 935.

JURISDICTION

The judgment of the Court of Claims was entered on October 17, 1979, and a petition for rehearing

was denied on November 21, 1979 (Pet. App. 1b). The petition for a writ of certiorari was filed on January 24, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether legislation enacted by Congress that had the effect of nullifying a license granted to petitioner Appalachian Power Company by the Federal Power Commission was a compensable taking of property within the meaning of the Fifth Amendment, where judicial review of the Commission order granting the license had not been completed before enactment of the legislation.

STATEMENT

1. On June 14, 1974, the Federal Power Commission issued a license to petitioner Appalachian Power Company [1] to build a hydroelectric dam (the "Blue Ridge Project") on the New River in Virginia and North Carolina. *Appalachian Power Co., Project No. 2317*, 51 F.P.C. 1906 (1974). At the time the license was issued, legislation was pending in Congress to designate the affected portion of the New River for protection under the Wild and Scenic Rivers Act of 1968, 16 U.S.C. 1271 *et seq.* (Pet. App. 4a n.4). Once

[1] Petitioners in this case are the licensee Appalachian Power Company and other power companies with derivative interests in the Blue Ridge Project (Pet. App. 1a-2a n.1). We use the term "petitioner" throughout this brief to refer to Appalachian individually and to petitioners collectively.

protected under the Act, the river segment would no longer be available for hydroelectric development. In recognition of that fact, and in order to afford Congress an opportunity to act on the legislation (already passed by the Senate and vigorously supported in the House), the FPC licensing order provided that the license would not take effect until January 2, 1975. *Appalachian Power Company, Project No. 2317, supra*, 51 F.P.C. at 1951. The Commission's accompanying opinion stated: "If there is no such Act of Congress by that date, the license herein granted will become effective, unless otherwise delayed by judicial review." *Id.* at 1952. The legislation was not enacted by Congress (Pet. App. 4a n.4).

Petitioner formally accepted the license by action of its Board of Directors on June 20, 1974 (Pet. App. 4a). Shortly afterward, in accordance with the judicial review provisions of the Federal Power Act, 16 U.S.C. 825*l* (Pet. App. 12c-14c), the State of North Carolina sought review of the Commission's licensing order in the United States Court of Appeals for the District of Columbia Circuit, alleging procedural defects in the FPC's decision-making process (*id.* at 5a). Prior to the effective date of the license, North Carolina sought a stay of the Commission's order pending review, which was granted by the court of appeals on January 31, 1975 (*ibid.*). On March 24, 1976, the court of appeals issued an opinion vacating the stay and affirming, with one modification, the Commission's order granting the license. *North Carolina* v. *FPC*, 533 F.2d 702 (D.C.

Cir. 1976). The court of appeals ordered that the license be modified to require petitioner to undertake archaeological research, excavation, and salvage in the project area prior to the dam construction as a condition of its license. 533 F.2d at 709. However, the decision of the court of appeals did not automatically reinstate an already effective license, for as the court expressly recognized, the Commission was required to decide, following the court's decision, whether to make the license effective immediately. 533 F.2d at 709-710.

North Carolina filed a timely motion in the court of appeals for a stay of the mandate, which was granted on May 5, 1976, to and including May 14, 1976. On May 14, 1976, North Carolina petitioned this Court for a writ of certiorari (*North Carolina* v. *FPC*, No. 75-1657). Under the provisions of Fed. R. App. P. 41, the court of appeals' mandate remained stayed pending disposition of the certiorari petition.[2]

2. Before this Court acted on North Carolina's petition for certiorari, Congress enacted an amendment to the Wild and Scenic Rivers Act which added to the national system of wild and scenic rivers the

[2] On March 26, 1976, two days after the court of appeals' opinion was issued, the Commission issued an order purporting to make the license effective immediately. Because the mandate of the court of appeals had not yet issued, however, the FPC was without jurisdiction to act in the case. *Ford Motor Co.* v. *NLRB*, 305 U.S. 364, 368-372 (1939); 16 U.S.C. 825*l*(a)-(b); 9 *Moore's Federal Practice* § 203.11 at 735 & n.5 (1975). See also *Hovey* v. *McDonald*, 109 U.S. 150 (1883).

segment of the New River that was to be affected by the Blue Ridge Project. Pub. L. No. 94-407, 90 Stat. 1238 (Sept. 11, 1976). The amendment specifically rendered ineffective any FPC license "heretofore or hereafter issued" affecting the designated wild and scenic portion of the New River.

Following the enactment of Pub. L. No. 94-407, this Court, on October 18, 1976, granted North Carolina's petition for certiorari, vacated the judgment below, and remanded to the court of appeals for further consideration in light of the new legislation. *North Carolina* v. *FPC*, 429 U.S. 891 (1976). The court of appeals concluded on remand that North Carolina's challenge to the license was now moot and dismissed the petition for review. *North Carolina* v. *FPC*, No. 74-1941 (D.C. Cir. Jan. 4, 1977).

3. Petitioner then filed the present action in the Court of Claims for compensation under the Tucker Act, 28 U.S.C. 1491, claiming that by nullifying its FPC license to build and operate the Blue Ridge Project—a license, according to petitioner, that had vested irrevocably for 50 years on its conditional effective date of January 2, 1975—Pub. L. No. 94-407 effected a taking of property or contract rights within the meaning of the Fifth Amendment. The Court of Claims granted summary judgment for the United States and dismissed the petition. The court found it unnecessary to decide to what extent FPC licenses may be irrevocable generally or under what conditions such licenses may vest. Instead, the court concluded that the enactment of Pub. L. No. 94-407

did not constitute a compensable taking because, at the time of the enactment, petitioner's license was still subject to judicial review and "the irrevocable attribute of an FPC license does not vest until judicial review is complete or the time for such review has lapsed" (Pet. App. 14a).

ARGUMENT

The decision of the Court of Claims is correct and does not conflict with any decision of this Court or a court of appeals. Moreover, this case arises from a unique set of circumstances, unlikely to recur, and thus is not an appropriate vehicle for reviewing the broad questions petitioner seeks to present.

Petitioner's contentions are essentially reducible to the claim that Congress could not, without paying compensation, exercise its legislative power under the Commerce Clause to protect the free flow of a navigable stream, where the exercise of that power had the effect of precluding the construction of a hydroelectric project by the recipient of a FPC license that was still under legal challenge at the time Congress enacted the legislation. Recognizing that any property rights it possessed with respect to the license arose solely under the Federal Power Act, 16 U.S.C. 791a *et seq.*, petitioner contends (Pet. 14-15) that, by virtue of certain provisions in that Act, its economic interest in building the project authorized by the license was converted, on January 2, 1975 (the proposed effective date for the license), into a vested right that could not be frustrated by legislation without the payment of compensation. Specifically, petitioner relies on provisions (1) empowering the Commission to issue licenses (16 U.S.C. 797(e)) for a period not exceeding 50 years (16 U.S.C. 799), (2) specifying that "[l]icenses may be revoked only for the reasons and in the manner prescribed under the provisions of this chapter, and may be altered * * * only upon mutual agreement" (16 U.S.C. 799), and (3) stating that although Congress reserved the right to amend or repeal "this chapter [the Federal Power Act] * * * no such alteration, amendment, or repeal shall affect any license theretofore issued under the provisions of this chapter or the rights of any licensee thereunder" (16 U.S.C. 822).

1. As we explain below (pages 9-12, *infra*), we believe that the Court of Claims properly concluded that nothing in the Federal Power Act operates to give petitioner, or any other licensee, a right to compensation from the United States in the event that Congress chooses to enact legislation in connection with a different regulatory statute that frustrates plans to construct a project authorized by an FPC license, at least where such legislation is enacted before judicial review of the order granting the license is completed. But the judgment of the Court of Claims in this case is sustainable even without reaching that question: it is clear that, under the terms of the particular Commission opinion approving the issuance of the license at issue here, petitioner's license had not yet become effective at the time Congress enacted Pub. L. No. 94-407.

As petitioner notes (Pet. 11-12), the Federal Power Act provides that "[o]rders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe" (16 U.S.C. 825h). The FPC licensing opinion in this case designated January 2, 1975, as the effective date of petitioner's license but expressly noted that this date would not govern if (i) Congress had * * * previously enacted legislation preventing construction of the Blue Ridge Project or (ii) the license was "delayed by judicial review." *Appalachian Power Co., Project No. 2317, supra,* 51 F.P.C. at 1951-1952. It is beyond dispute that the licensing order was subject to judicial review on January 2, 1975, and that such review was not completed at the time Congress enacted Pub. L. No. 94-407. Indeed, a motion for a stay of the Commission's order, filed by North Carolina, was pending on January 2 and was granted by the court of appeals on January 31, 1975. Moreover, as explained above (page 4, *supra*), the court of appeals recognized that petitioner's license would only become effective by action of the Commission after the court, on March 24, 1976, had issued its opinion and vacated the stay of the order. (The FPC accordingly attempted to make the license effective immediately thereafter, albeit at a time when it lacked jurisdiction of the case (see page 4, note 2, *supra*).) Finally, North Carolina secured a stay of the court of appeals' mandate, and that stay was still in effect when Pub. L. No. 94-407 was enacted.

Petitioner's own conduct reflects a recognition of its position under the FPC opinion while judicial review was under way. As petitioner conceded in the court below (Pl. Brief after Argument at 6), it took no action in reliance on its license until after the FPC order had been modified by the court of appeals, and even then it confined itself to expending a "relatively small" amount for certain archaeological studies ordered by that court.

In sum, in light of the specific provision in the Commission's opinion conditioning the effectiveness of petitioner's license on the absence of a stay pending judicial review, there is no need in this case to decide the question "[w]hether an administrative agency lacks the power to create effective rights before the completion of judicial-review proceedings" (Pet. 2) or any of the other broad administrative law issues presented in the petition.

2. Even if the Commission's licensing opinion had not notified petitioner of the lack of final effectiveness of the license during the period of judicial review, the result reached by the Court of Claims would still be proper. The court correctly held (Pet. App. 14a) that whatever irrevocability may inhere in an FPC license, that "attribute * * * does not vest until judicial review is complete or the time for such review has lapsed." The issuance of such a license is a grant of a special franchise that depends ultimately on the regulatory power of Congress under the Commerce Clause. *Louisville Bridge Co.* v. *United States,* 242 U.S. 409, 417 (1917), teaches that, whether or

not Congress could "by contract or estoppel prevent itself from modifying or revoking a regulation once made and substituting another in its place without compensation" (a question not decided in *Louisville Bridge* and not presented in this case), it cannot be assumed, in the absence of a plain statement of a contrary congressional intent, that such a franchise has been rendered irrevocable. As the Court noted (242 U.S. at 417):

> [W]hen private rights of an indefeasible nature are sought to be derived from regulatory provisions established in the exercise of [the commerce] power, the case is peculiarly one for the application of the universal rule that grants of special franchises and privileges are to be strictly construed in favor of the public right, and nothing is to be taken as granted concerning which any reasonable doubt may be raised.

The Federal Power Act does grant several protections to a licensee. The Commission may not alter or revoke a license except for the reasons and pursuant to procedures specified in the Act (16 U.S.C. 799), and Congress has declared that it will not amend the Act in a way that affects licenses or the rights of licensees (16 U.S.C. 822). But the Act also provides that licenses issued by the Commission are fully reviewable in the courts (16 U.S.C. 825*l*), and nothing in the statute suggests that a license issued in a decision still under review (and thus still subject to modification or even extinction by the courts) is invulnerable to the general regulatory powers of Congress. Thus, in *Scenic Hudson Preservation Conference* v. *Callaway*, 370 F. Supp. 162, 171-172 (S.D.

N.Y. 1973), aff'd per curiam, 499 F.2d 127 (2d Cir. 1974), the court held that nothing in the Federal Power Act prevented Congress from enacting legislation (Section 404 of the Federal Water Pollution Control Act, 33 U.S.C. 1344) that would impose permit requirements on FPC licensees who undertake projects that entail the discharge of dredged and fill materials into navigable waters—requirements that clearly may affect the right of a licensee to build a project authorized under the Federal Power Act. If Congress was empowered to enact legislation having that effect,[3] then there is no reason why Congress

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[3] Petitioner does not argue that *Scenic Hudson* was wrongly decided, but contends only that the Court of Claims did not construe it correctly (Pet. 21-22 n.20). Specifically, petitioner attacks the court's statement (Pet. App. 12a-14a) that, even had judicial review of the license concluded before the enactment of Pub. L. No. 94-407, that legislation would not fall within the proscription of 16 U.S.C. 822, because it is not an amendment to the Federal Power Act but rather part of "a statute of general application," like the Federal Water Pollution Control Act considered in *Scenic Hudson*. Although, as petitioner contends, Pub. L. No. 94-407 clearly had a specific—and intended—effect on petitioner's plan to construct the Blue Ridge Project as authorized under the FPC license, the law still qualifies as general legislation outside the proscription in 16 U.S.C. 822. The segment of the New River included in the Wild and Scenic Rivers Act by virtue of Pub. L. No. 94-407 acquired all of the protections provided by that Act, not just protection against the inundation that would result from the construction of the Blue Ridge Project (see Pet. App. 12a-13a). Moreover, there is nothing anomalous in extending the Act's protections to part of a single river. The express purpose of that statute is to protect "certain selected rivers of the Nation which, with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values." 16 U.S.C. 1271.

may not, without providing compensation, take direct action to protect the free flow of a navigable river on which a project authorized under an FPC license is to be built, at least where the license is still under judicial challenge.

3. Contrary to petitioner's contention (Pet. 9-24), the decision of the court below does not conflict with *Payne* v. *New Mexico*, 255 U.S. 367 (1921), or *CAB* v. *Delta Air Lines*, 367 U.S. 316 (1961). Those cases concerned the powers conferred on administrative agencies by specific statutes to affect rights granted under those statutes.

In *Payne*, the Secretary of the Interior sought to withdraw an offer to exchange certain federal lands ("lieu lands") for other lands ("the base tract") originally open to selection by the State of New Mexico because the Secretary decided, after the State had made its selection of "lieu lands," that the federal government did not wish to acquire the base tract lands. The Court held that, although the State's selection application was pending in the General Land Office at the time the Secretary changed his mind, the Secretary was bound by the selection because his power to approve or disapprove selections was limited to determining whether they met all applicable requirements when made. Although the Court's opinion speaks in terms of the "vesting" of the State's right to the land selections (255 U.S. at 371), the case was not a suit for just compensation, and the Court decided merely that the Secretary was powerless to change his mind after a State selection had been

approved unconditionally, without regard to the limits on the Secretary's discretion under the applicable statute to deny approval of state selections.

Similarly, *Delta Air Lines* concerned an agency's power to alter an administrative decision after its effective date, without undertaking the notice and hearing required by statute for reconsideration in such circumstances. The Court did not hold that the administrative decision was immutable or that Congress could not, without granting compensation, enact legislation that might have the effect of frustrating the exercise of rights conferred by the decision. The Court held only that if the CAB desired to reconsider its decision, it must proceed in the manner prescribed by the governing statute. 367 U.S. at 329. That proposition in no way conflicts with the holding of the Court of Claims in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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